UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CATHY A. MEHLENBACHER — CASE NO. 97-66615

Debtor — Chapter 7

PAUL RAVAS

Plaintiff

vs. — ADV. PRO. NO. 98-70001

CATHY A. MEHLENBACHER

Defendant

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The plaintiff in this adversary proceeding, Paul Ravas ("Plaintiff"), is the former husband of Cathy Mehlenbacher ("Debtor"), who has filed a petition in this Court for relief under Chapter 7 of the United States Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). In a complaint filed

on January 2, 1998, Plaintiff seeks a determination that a $33,000 claim against Debtor arising out of the parties' divorce is nondischargeable by operation of Code §523(a)(15). A trial was held in Utica, New York, on June 8, 1998, after which the parties were granted an opportunity to submit memoranda of law. The matter was submitted for decision on July 8, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1), and (b)(2)(I).

FACTS

After eleven years of marriage and two children,[1] Plaintiff and Debtor were divorced on November 12, 1996. Most issues relating to the division of the couple's marital assets and liabilities were resolved in a Separation and Opting-Out Agreement ("Separation Agreement") prepared by Plaintiff and Debtor with the assistance of counsel on October 1, 1996, which was later incorporated into the Judgment of Mutual Divorce entered by Justice Phillip R. Rumsey of the New York State Supreme Court for Tompkins County. In pertinent part, Article VIII of the Separation Agreement awarded the Plaintiff $40,000, to be paid in installments by Debtor as consideration for Plaintiff's equitable share of a master's degree and teaching certificate earned

[1] Matthew Paul Ravas (born May 30, 1986) and Daniel John Ravas (born October 17, 1990).

by Debtor during the parties' marriage ("Property Settlement"). The amount of each installment was to equal the amount of Plaintiff's periodic child support payments to Debtor,[2] which was initially set at $125.00 per week. As a practical matter, these two obligations were designed to set off each other in full, and until the filing of Debtor's Chapter 7 petition no money ever changed hands pursuant to either obligation. The parties have stipulated that the outstanding balance on the Property Settlement obligation is now $33,000.

Debtor filed a petition in this Court for relief under Chapter 7 of the Code on November 3, 1997. On January 2, 1998, Plaintiff filed an adversary complaint objecting to the discharge of the Property Settlement obligation pursuant to Code § 523(a)(15). On May 27, 1998, pursuant to a temporary modification of the child support order issued by the Onondaga County Family Court, Plaintiff was ordered to begin turning over $125 a week to the Onondaga County Support Collection Unit ("Family Court Action"). At trial, the Court heard extensive testimony regarding each party's current and prospective financial condition, and adopts the following as findings of fact pursuant to Rule 52 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."), incorporated by reference into Rule 7052 of the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P."):

A. Debtor's Finances

Debtor holds bachelor's and master's degrees from SUNY-Cortland, as well as a New York State Permanent Teaching Certificate. At the time her petition was filed, Debtor was employed as a teacher by the Ithaca City School District, with take-home income of $2,198.49

[2] It appears from the Agreement that custody of the parties' two children was awarded to Debtor by the Family Court of Tompkins County on January 9, 1996.

per month. Since then, Debtor's financial condition has deteriorated considerably. In December 1997, Debtor resigned her job under circumstances not clearly explained at trial[3] and, thereafter, moved to Marcellus, New York. Debtor found intermittent employment in the first half of 1998 as a substitute teacher in the Marcellus area at a salary of $58 per day, and stated at trial that she expected to earn a total of $1,600 during the summer of 1998 for work at a children's camp. While Debtor has been seeking a new teaching or curriculum-writing position for 1998-99, she currently has no regular source of income. Debtor has been on public assistance since March, 1998, and although she expressed an intention to get off public assistance during the summer, she conceded that this would be very difficult so long as Plaintiff's child support payments continue to be offset by her marital property obligation.

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[3] On examination by Plaintiff's counsel, Debtor stated that

> I was under two different bosses and I believe that the negative feelings that were felt at Southfield, which was the last school that I was [at] prior to the one this last fall, had-- even though I had changed school buildings, there were still negative feelings. I had the feeling that they were going after me to get rid of me, they had me fired, and documentation and subject to prove that.

Trial transcript ("Tr. Tran.") at 24 (June 8, 1998). On examination by her own counsel, Debtor added that

> There was a particular teacher assistant that was employed within the classroom that was not doing her job and I was not getting any support from the administration to encourage her to do her job and when this person found out that I was going to the administration and asking for support, she started giving them negative information concerning myself and it just-- it was not a good situation and the bankruptcy was coming and there were many reasons why but basically the children and I needed a place to go and to start over and I was not going to leave any-- position stained because I knew the quality of teacher that I was and that I was in the middle of something that I couldn't change.

Tr. Tran. at 36.

According to the evidence presented at trial, the monthly expenses for Debtor and her children were approximately $1,678.57 at the time of the trial[4]. This figure does not include payment on liabilities that are expected to be discharged under Chapter 7, nor does it include payment of the obligation whose dischargeability is at issue in the present action. However, it does include payments on a secured automobile loan that Debtor has reaffirmed.

B. Plaintiff's Finances

Plaintiff is employed full-time as an electrician by Pleasant Valley Electric of Ithaca, New York, and receives take-home pay of approximately $1,775.99 per month. Since the divorce, Plaintiff has sporadically supplemented his income by working as a substitute teacher for the Newfield Central School District. Although Plaintiff has obtained a Certificate of Qualification to teach, he does not yet have a masters' degree and is thus ineligible for a New York State Permanent Teaching Certificate. As a result, the Court finds that Plaintiff is not likely in the near term to significantly increase his supplemental teaching income from its current level of

[4] Specifically, Debtor testified to expenses of $614 per month for rent, $300 per month for food, $0 per month for clothing, $55 per month for electricity, $55 per month for telephone, $15 per month for laundry, $115 per month for insurance, $294.57 per month for an automobile payment, and $100 per month for gas. In addition, Debtor testified that her automobile maintenance expenses for the previous six months had been approximately $600. While the Court commends Debtor for her candor in presenting what appear to be deflated rather than (as is often the case) inflated monthly expenses, it does not find the above figures entirely credible. In particular, the Court doubts the ability of Debtor's household to maintain itself with exactly zero dollars budgeted for clothing and miscellaneous expenses. Nevertheless, in the absence of any evidence by Plaintiff suggesting that any of these figures should be even lower, the Court will treat the $1,678.57 figure as representing, if nothing else, a theoretical minimum for Debtor's monthly expenses.

approximately $35 per month.[5]

Plaintiff owns a home in Lansing, New York as a tenant in common with his mother, the market value of which is approximately $50,000. Plaintiff drives a 1994 Geo Prizm, but testified that he does not have any equity in it, as he believes that the market value of the vehicle is less than the total amount still owed for it. Plaintiff pays $320 per month on a line of credit secured by the house and $181 per month on his car loan.

Pursuant to an order issued in the Family Court Action, Plaintiff is currently making child support payments of $125 per week, or approximately $537.50 per month. In addition, Plaintiff obtained a bachelor's degree in 1996 that was financed in large part through student loans, the payments on which are currently $182.00 per month. According to an affidavit filed in the Family Court Action and introduced into evidence at trial before this Court, Plaintiff's other monthly living expenses totaled $733.00 as of April, 1996,[6] (*see* Defendant's Exh. B) Including the child support liability, but excluding the Property Settlement income, Plaintiff's total monthly balance sheet thus reveals income of approximately $1,810.99 and expenses of $1,953.50.

DISCUSSION

[5] The record indicates that Plaintiff earned a gross total of $420.00 from the Newfield Central School District in 1997, and a gross total of $120 in the first three months of 1998.

[6] As itemized in Plaintiff's affidavit, this includes $100 per month for food, $45 per month for telephone, $85 per month on clothing, $15 per month on laundry, $15 per month on medical, dental, and medication costs, $85 per month for life insurance, $68 per month for automobile insurance, $120 per month on gas and automobile maintenance, and $200 per month for miscellaneous expenses. The Plaintiff's Response to Defendants's First Set of Interrogatories, introduced into evidence as Plaintiff's Exhibit 3, gave figures that were identical except for the addition of a $25 expense for charitable contributions in the latter document.

Code § 523(a)(15), enacted in 1994, provides that

> (a) A discharge under section 727, 1141, 1228(a) 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt . . .
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> . . . (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--
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> > (A) the debtor does not have the ability to pay such debt from income or property of the debtor reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
> >
> > (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Beneath all the double and triple negatives of this section-- which one court has quite justifiably described as legislative "sausage"[7]-- Congress has set out a three-step test for determining whether a debt arising out of a divorce settlement is dischargeable in bankruptcy. The first step is to determine whether the debt is by its nature alimony or support, as distinguished from a simple division of property. If it is in the nature of support, the debt is exempted from discharge by Code § 523(a)(5) and the inquiry ends. If the debt is not support, however, the court must turn to step two of the analysis and determine whether or not the debtor has the ability to pay it. If the debtor cannot pay, the debt is discharged pursuant to Code § 523(a)(15)(A). If the debtor does have the ability to pay, the analysis enters its third and final step, in which the court must balance the potential hardships faced by each party under Code §

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[7] *Kessler v. Butler (In re Butler)*, 186 B.R. 371, 372 (Bankr. D. Vt. 1995).

523(a)(15)(B) and, in effect, award judgment to whichever party can least afford to lose.[8]

One issue that has sharply divided bankruptcy courts is the placement of burden of proof for Code § 523(a)(15)(A) and (B). *See Stone v. Stone (In re Stone)*, 199 B.R. 753, 760 (Bankr. N.D. Ala. 1996) (citing cases). Although a majority of jurisdictions appear to have shifted the burden of proof to the party seeking discharge for one or both subsections of §523(a)(15), this Court has adopted the position that, in keeping with the Code's background presumption of dischargeability, the burden of proof lies with the party opposing discharge under both subsections, and that the standard of proof is by preponderance of the evidence. *See Frey v. Frey (In re Frey)*, 728 B.R. 728, 737 (Bankr. N.D.N.Y. 1996).

The parties do not dispute that the Property Settlement created a nonsupport debt for purposes of Code § 523(a)(5). As a result, the only issue before the Court is whether Plaintiff can prove both that Debtor has the ability to pay her Property Settlement obligation under Code § 523(a)(15)(A) and that the benefits of discharge to Debtor would not outweigh the detrimental consequences to Plaintiff in the event that the debt is discharged.

A. Code §523(a)(15)(A)

In their analyses of the "ability to pay" test of Code § 523(a)(15)(A), nearly all courts have adopted the "disposable income" standard of Code § 1325(b) (regarding with Chapter 13

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[8] While the vast majority of bankruptcy courts have followed this road map to §523(a)(15), a few have interpreted the text differently. For example, at least one court has held that in order to discharge a marital debt under §523(a)(15), the debtor must satisfy both the ability to pay prong of subsection (A) and the hardship prong of subsection (B). *See Duet v. Richards (In re Richards)*, 207 B.R. 266, 269 (Bankr. M. D. Fla. 1997). However, this reading of the text appears to ignore the disjunctive "or" between subsections (A) and (B).

plan confirmation), under which courts subtract the debtor's expenses from the debtor's income and determine whether the surplus is large enough to meet the payments on the debt. *See Frey*, 199 B.R. at 737. However, one important difference between the two sections is that while Chapter 13 plan contributions can later be modified, the discharge of a debt is permanent. As a result, though accepting the disposable income test as a general concept, most courts have rejected the mechanical application of § 1325(b) case law to § 523(a)(15)(A). *See Straub v. Straub (In re Straub)*, 192 B.R. 522, 528 (Bankr. D.N.D. 1996).

Although there is some support for the argument that courts should compute only a debtor's minimally necessary (rather than actual) expenses, *see Slover v. Slover (In re Slover)*, 191 B.R. 886, 892 (Bankr. E. D.Okla. 1996) (refusing to take into account debtor's voluntary payment of extra child support), it is unnecessary to reach this issue in the present case, since Plaintiff has produced no evidence that the Debtor could survive on a tighter budget. The problem of computing Debtor's income for the purposes of a § 523(a)(15)(A) analysis, however, is much more complicated. Debtor is presently underemployed, and appears to have no disposable income whatsoever. However, the evidence also indicates that Debtor has a reasonable earning potential of at least $38,000 a year, based on her salary at her last full-time teaching job. It is this latter figure, argues Plaintiff, that the Court should use for its ability-to-pay computation.

At a minimum, every court that has addressed the matter is in accord that where a debtor refuses to find work, or voluntarily reduces his or her income in bad faith in order to gain a strategic advantage in the bankruptcy litigation, the court will compute ability to pay based on potential rather than actual income. *See Humiston v. Huddelston (In re Huddelston)*, 194 B.R.

681, 688 (Bankr. N.D. Cal. 1996) (calculating ability to pay based on the debtor's potential income where debtor had not made good faith efforts to obtain a well-paying job); *Florio v. Florio (In re Florio)*, 187 B.R. 654, 657 (Bankr. W. D.Mo. 1995) (calculation of ability to pay based on debtor's income from her previous job where the debtor had changed to a much lower-paying career postpetition in an apparent attempt to gain a strategic advantage in bankruptcy litigation). In the present case, the record does raise questions about the circumstances surrounding Debtor's resignation from her last job. Even so, the Court cannot conclude that Plaintiff has proven by a preponderance of the evidence that Debtor's current unemployment is the result of voluntary behavior comparable to that of the debtors in the cases cited above.

Courts are less in agreement where the debtor's unemployment or underemployment is involuntary. *Compare Greenwalt v. Greenwalt (In re Greenwalt)*, 200 B.R. 909, 913 (Bankr. W.D. Wash. 1996) (measure according to present underemployment income); *In re Smither*, 194 B.R. 102, 107 (Bankr. W. D.Ky. 1996) (court may consider future earning potential); *Adie v. Adie (In re Adie)*, 197 B.R. 8, 10 (Bankr. D.N.H. 1996) (measure according to present income unless future change in income is certain to occur). In the view of this Court, the *Smither* approach is most in keeping with the structure and purpose of Code §523(a)(15). As noted above, the relief requested by the debtor in a case such as this is permanent, and a flat rule that would prohibit a court from even considering future events would seem to invite injustice. *See Smither*, 194 B.R. at 108. Moreover, a finding that the debtor is unable to pay prevents the court from even considering the equities of the case under Code §523(a)(15)(B), suggesting that Congress intended the class of debtors discharged under subsection (A) to be under- rather than over-inclusive. For these reasons, the court holds that for purposes of Code §523(a)(15)(A),

disposable income is calculated by reference to the debtor's earning potential rather than actual present earnings-- provided, of course, that the party opposing discharge can prove a value for the former figure that exceeds the latter.

In the present case, the evidence at trial established that Debtor's monthly take-home pay at her last full-time job was $2,198.49 per month. In light of Debtor's educational qualifications, the Court is persuaded by a preponderance of the evidence that Debtor has a reasonable potential to obtain a comparable job in the near future. Adding Debtor's projected monthly salary to her monthly child support entitlement, the Court finds that the Debtor will have a total of $2,735.99 per month available to support herself and her dependents. Subtracting monthly expenses of $1,678.57, Debtor would thus have $1,052.42 per month in disposable income. As this exceeds the $537.50 per month currently owed to plaintiff, the Court finds that the Debtor does have the ability to pay her Property Settlement obligation for purposes of Code § 523(a)(15)(A).

B. Code § 523(a)(15)(B)

In contrast to Code § 523(a)(15)(A), the language of Code § 523(a)(15)(B) does not appear anywhere else in the Code. Deprived of any recourse by analogy to other Code provisions, and with almost no appellate case law to date, the courts that have interpreted this subsection have reached wildly inconsistent results. A few courts have held that discharge is almost never appropriate once the debtor has been found to have the ability to pay under Code § 523(a)(15)(A), *see Carroll v. Carroll (In re Carroll)*, 187 B.R. 197, 201 (Bankr. S.D. Ohio 1995); at the other extreme, one court has concluded that absent unusual circumstances, "it is hard to conceive of a situation in which the creditor wins." *Collins v. Hesson (In re Hesson)*, 190

B.R. 229, 241 (Bankr. D. Md. 1995). However, the largest number of courts have held that Code § 523(a)(15)(B) simply requires a comparison of the parties' wealth, since the loss of any given amount will be felt more sharply by whomever had less money to begin with. *See Samayoa v. Jodoin (In re Jodoin)*, 196 B.R. 845, 856 (Bankr. E.D. Cal. 1996), *aff'd.* 209 B.R. 132 (B.A.P. 9th Cir. 1997). But while wealth utility is probably the single most important factor in a Code § 523(a)(15)(B) analysis, courts have also given weight to an expansive range of other minor considerations. *See Schmitt v. Schmitt (In re Schmitt)*, 197 B.R. 312, 317 (Bankr. W.D. Ark. 1996) (credit rating of nondebtor plaintiff); *Slover*, 191 B.R. at 893 (conduct of parties during and after the marriage); *Hesson,* 190 B.R. at 240 (effect on third parties).

By this standard, the present case appears to be extremely close. While Plaintiff has established that Debtor will eventually be in a better position to bear an adverse decision in this matter, several powerful factors weigh in favor of dischargeability. Among these are the uncertainty of Debtor's obtaining satisfactory employment in the near future, the short-term effect on the parties' children, the possibility that Plaintiff will be able to obtain state court modification of the support order should circumstances change further and Debtor's need for a fresh start. Accordingly, the Court finds that Plaintiff has failed to meet his burden of proving that the detriment to himself of discharging the debt is not outweighed by the benefit of discharge to Debtor and her dependents.

Based on the foregoing, it is

ORDERED that the Plaintiff's complaint seeking a determination that the balance of a $40,000 debt owed to Plaintiff by Debtor is nondischargeable is hereby DISMISSED.

Dated at Utica, New York

this 18th day of September 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge